Supreme Court, U.S.
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In The

Supreme Court of the United States

MICHAEL SCHMIER,

Petitioner,

vs.

SUPREME COURT OF CALIFORNIA, CALIFORNIA COURTS OF APPEAL, AND CALIFORNIA JUDICIAL COUNCIL,

Respondents.

On Petition For Writ Of Certiorari To The Court Of Appeal Of The State Of California, First Appellate District, Division Five

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. May a statutory scheme allow a judiciary the unfettered discretion to make its appellate decisions selectively prospective, vary rules of law on an *ad hoc* basis, and render the doctrine of *stare decisis* nugatory?

2. Does a statutory scheme which forbids litigants, on pain of contempt, from mentioning rules of law, applications of rules of law to fact, and legal reasoning contained in pertinent previous decisions, which would relieve any of these litigants of criminal or civil liabilities, violate the Constitutional right of free speech or the right to petition government for a redress of grievances?

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OPINIONS BELOW

The Fifth Division of the California First District Court of Appeal issued its opinion on February 28, 2000. App. 1-13. This Opinion was reported at 78 Cal. App. 4th 703. On March 22, 2000, the California Court of Appeal denied petitioner's request for rehearing. App. 14. On May 24, 2000, the California Supreme Court denied review. App. 15.

JURISDICTION

The Fifth Division of the California First District Court of Appeal issued its opinion on February 28, 2000. The Court of Appeal denied petitioner's timely request for rehearing on March 22, 2000. The order of the California Supreme Court denying review was filed on May 24, 2000.

This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The First Amendment to the United States Constitution provides in pertinent part that, "Congress shall make no law . . . abridging the freedom of speech, . . . and to petition the government for a redress of grievances."

2. Section 1 of the Fourteenth Amendment to the United States Constitution provides, in pertinent part that "No State shall . . . deprive any person of life, liberty,

or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

3. This petition involves the constitutionality of California Rules of Court 976 through 979 (West 1999), which are summarized herein in the Statement of the Case, and the full text of which are set out in full in the Appendix to this petition. App. 16-21.

STATEMENT OF THE CASE

A. Procedural History and Presentation of Federal Question

Petitioner Michael Schmier (hereinafter "petitioner"), individually and for all persons similarly situated in the State of California, brought an action against defendants The Supreme Court of California, California Courts of Appeal and the California Judicial Council (hereinafter collectively referred to as "respondents"), seeking injunctive and other relief. CT 1-14. Petitioner alleged in his complaint that Rules 976 through 979 of the California Rules of Court ("the non-publication rules") were invalid because, *inter alia*, they violate the federal Constitutional rights to equal protection, due process, freedom of speech and right to petition the government for redress of grievances. CT 5. The trial court sustained respondents' demurrer to the complaint and this ruling was upheld by the California Court of Appeal. App. 1-13.

B. Factual Background: The Rules and Their Lack of Mandatory Standards

California's non-publication rules, like those of many jurisdictions, limit which opinions issued by the appellate courts will be given precedential effect. Absolutely nothing restrains the courts' discretion to choose which opinions shall be applied in the future versus those that will apply only to the parties before the court.

These rules create a scheme whereby appellate courts can make "new law" or create conflicts with established law *without* having to make this new law available or applicable to future litigants or the public. Rule 976(b). The courts are not bound to apply this new law in future cases but can disregard it, since under the Rules of Court, such "new law" is not binding precedent. Rule 977(a). Indeed, the rules *mandate* that a court not rely on this "new law" in future cases, and no future litigants may cite it as binding precedent, or even persuasive authority. Rule 977(a). By virtue of this rule, such "new law" is not really "law" at all. It is not uniformly applicable to all, as laws must be.

1. Rule 976

Under Rule 976(b), no opinion of a Court of Appeal or an appellate department of a superior court may be published **unless it**:

> (1) establishes a new rule of law, applies an existing rule to a set of facts significantly different from those stated in published opinions, or

modifies, or criticizes with reasons given, an existing rule;

(2) resolves or creates an apparent conflict in the law;

(3) involves a legal issue of continuing public interest; or

(4) makes a significant contribution to legal literature by reviewing either the development of a common law rule or the legislative or judicial history of a provision of a constitution, statute, or other written law.

The objectionable portion of this rule is contained in the prefatory language: it clearly indicates that *publication is never required*, even for opinions which meet one of the four listed criteria. Thus, the courts have been granted the ability to make "new rules of law" without publishing those laws to the public who will be subject to them.

2. Rule 977

Under Rule 977(a), any opinion which is not ordered published may not be cited or relied on by any court or party in any other proceeding. **Rule 976 precludes any party from bringing to a court's attention any unpublished opinion *under any circumstance*,[1] regardless of how pertinent that opinion may be, regardless of whether that opinion established new rules of law about which the party wishes to apprise the court, and**

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[1] The rule contains limited exceptions which do not affect the analysis. Rule 977(b).

regardless of whether the rule of law set forth in that opinion would relieve that party from criminal or civil liability. Indeed, this rule prevents a court from ever relying on such an opinion as authority. Rule 977(a) thus ensures that cases deemed not published under Rule 976 are made nullities.

3. Rule 978

Rule 978 provides for a procedure whereby any person may request publication of an opinion not certified for publication. Rule 978(a). However, the ultimate decision on whether to publish lies within the complete discretion of the Supreme Court. Rule 978(b). **Thus, no matter how much a particular unpublished case may change the law, or fail to follow the law, there is never any circumstance under which it *must* be published and thereby become precedent for the courts to follow in future cases and for the public to use to conform their behavior to the law.**

4. Rule 979

Rule 979 provides for a procedure whereby opinions that have been certified for publication can be "depublished" and thus made not binding precedent. Through depublication, the Supreme Court can make law "disappear" from the books, although the original litigant whose case was decided remains subject to that law.

There are no standards for when an opinion *should* be depublished. Most commentators suggest[2] that depublication is mainly used to make disagreeable precedent disappear, without having to distinguish or expressly overrule that precedent.

C. The Arbitrary Application of the Non-publication Rules

This action was dismissed upon demurrer before petitioner had any chance to conduct civil discovery. While the California Court of Appeal failed to acknowledge the factual allegations of petitioner's complaint (a basis upon which petitioner sought and was denied rehearing), the court recognized that upon demurrer these allegations must be accepted as true. App. 3, citing *Blank v. Kirwin*, 29 Cal. 3d 311, 318 (1985).

Petitioner made the following factual assertions in his complaint: that numerous demands have been made on the Courts of Appeal and the Supreme Court to publish opinions, which demands have been denied; that there is a lack of even-handedness in treatment of similarly situated litigants; and that criminal defendants have been deprived of the ability to cite cases which

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[2] *See, e.g.*, Gerald F. Uelman, *Publication and Depublication of California Court of Appeal Opinions: Is the Eraser Mightier than the Pencil*, 26 Loy. L.A. L. Rev. 1007 (1993); Robert S. Gerstein, *"Law by elimination:" depublication in the California Supreme Court*, 67 Judicature, Dec.-Jan. 1984, at 293-298 (1984); Julie Hayward Biggs, Note, *Censoring the Law in California: Decertification Revisited*, 30 Hastings L.J. 1577 (1979).

would otherwise be favorable or controlling. CT 3-4, 6-7, 8-9, 237-38.

The record also indicates that petitioner further alleged: that unpublished opinions have been issued which contained new legal holdings, inconsistent with binding precedent, which were applied only to the litigants involved in that case and not to future litigants; that because of the rules, California courts have decided cases on an *ad hoc* basis, without regard to precedent; that courts have abused the discretion granted by the rules by creating new liabilities or eliminating prior defenses, without announcing these changes in published opinions; and that courts decide whether to publish arbitrarily and without any rational grounds to do so. CT 115, 117, 122, 140, 230, 232-35.

Respondent California Judicial Council's own reports powerfully demonstrate the overuse of the non-publication rules. Far from simply weeding out the trivial or unimportant cases, these rules operate to prevent the citizens of California from accessing and citing the vast majority of law as declared and interpreted by the appellate courts. In 1997-98, the percentage of unpublished cases statewide was a remarkable 93%, with 87% of civil appeals not published and 96% of criminal appeals not published. California Judicial Council, *1999 Annual Court Statistics Report*, at 31. The rate of publication in some districts was even lower, with only 2% of the criminal appeals being published. *See id.*

REASONS FOR GRANTING THE WRIT

Petitioner herein challenges California's non-publication rules. As will be addressed below, these rules work together to create a system not to be tolerated by sound constitutional principals and basic doctrines of fairness and justice. Such rules eviscerate the system of *stare decisis* and the principle of equal protection of the laws upon which our democracy is based.

California's rules are particularly egregious in that they contain *no restriction whatsoever* on the exercise of this judicial power. Instead, courts remain free to apply the law in an arbitrary and *ad hoc* manner. Indeed, these rules forbid those who would seek to have the law applied in an evenhanded manner from even *mentioning* this unequal treatment, on pain of contempt. Such an unbridled exercise of raw governmental power cannot stand.

The non-publication rules produce a scheme in which courts fashion new rules of law applicable to single cases, creating classes of one. This type of "selective prospectivity" is unconstitutional absent certain safeguards not found here. *See James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991).

Here, *nothing* guides or restrains the use of selective prospectivity. Courts are allowed to apply new rules of law or refuse to apply settled ones on an arbitrary and *ad hoc* basis. Nothing mandates that the courts publish these decisions or apply them to future similarly situated litigants. Indeed, similarly situated litigants are barred from even *mentioning* such prior cases.

Beyond the legal challenge, petitioner seeks clarification of several issues raised by the application of these rules:

> (1) how can equal protection of law exist where courts have no institutional memory of the manner in which the law is applied in similar cases;
>
> (2) how can the public be presumed to know the law when the courts have no obligation to make the law public;
>
> (3) how can the public be certain that its judges correctly and honestly state the law when rulings and opinions are not made public for review and criticism;
>
> (4) how can the electorate ask its elected legislators to correct the law if the law as applied is unknown; and
>
> (5) to what effect is the doctrine of equal protection of the law, if law can be applied to an individual without immediately causing others that would be affected to complain on that individual's behalf, when the rule is unconstitutional, illegal or unjust?

This case presents questions of vital importance to the millions of individuals affected by California's nonpublication rules, similar rules in seven of the United States District Courts of Appeals, and approximately half of the state judiciaries. The rules challenged in this petition are powerfully corrosive of equal protection, freedom of speech, the rule of law, and many other of the doctrines that form the very core of our democratic form of government.

This Court should grant this Petition to examine the constitutionality of these rules and to explain to the citizenry how such an arbitrary and unfettered exercise of judicial power can be justified in light of the guiding principles of our democracy. Questions of alternatives, resource availability, criminal appeals, or even the desire of the American people for a system accountable to the Rule of Law over the more facile *ad hoc* arbitration of disputes cannot be measured until the issues are brought to the forefront for public consideration.

I. THE NON-PUBLICATION RULES VIOLATE DUE PROCESS AND EQUAL PROTECTION BY CREATING AN UNCONSTITUTIONAL SYSTEM OF SELECTIVE PROSPECTIVITY.

A. "Selective Prospectivity" Violates the Constitutional Guarantees of Equal Protection and Due Process.

All individuals are entitled to due process and to equal protection of the laws. U.S. Const., amend XIV, § 1. Equal protection and due process rest on the doctrines of precedent and *stare decisis*, because all citizens before the court are guaranteed to be subject to the same laws. As this Court declared:

> "[N]o judicial system could do society's work if it eyed each issue afresh in every case that raised it. [Citation]. *Indeed, the very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable." Planned Parenthood v. Casey*, 505 U.S. 833, 854 (1992) (emphasis added).

The non-publication rules run afoul of equal protection and due process by creating a system of "selective prospectivity" wherein the courts create new rules of law which will apply to one case and one case only. This Court has utterly rejected "selective prospectivity" as unconstitutional in both criminal and civil cases.

This Court first dispensed with selective prospectivity in the criminal arena in *Griffith v. Kentucky*, 479 U.S. 314 (1987). In that case, this Court held that "failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication." *Id.* at 322. This Court reasoned that "selective application of new rules violates the principle of treating similarly situated defendants the same." *Id.* at 324.

Four years later, this Court rejected "selective prospectivity" in the civil context. *See James B. Beam*, 501 U.S. 529; *see also Harper v. Virginia Dept. of Taxation*, 509 U.S. 86 (1993). While this Court recognized that new rules of law may or may not be given retroactive effect, once a Court has applied the law retroactively to *one* litigant, it *must*, as a matter of due process and equal protection, apply that rule to *all* litigants. *See James B. Beam*, 501 U.S. at 535-36.

> "[S]elective prospectivity also breaches the principle that litigants in similar situations should be treated the same, a fundamental component of *stare decisis* and the rule of law generally. [Citation]. 'We depart from this basic judicial tradition when we simply pick and choose from among similarly situated defendants those who alone will receive the benefit of a 'new' rule of constitutional law.' " *Id.* at. 537-38, quoting

Desist v. United States, 394 U.S. 244, 258-59 (1969).

This Court also stressed that such a system of "selective prospectivity" undermines the system of *stare decisis* which is the hallmark of our system of justice. *See id.* at 540. This concern was elaborated upon by Justice Blackmun in his concurrence:

> "The doctrine of *stare decisis* profoundly serves important purposes in our legal system. Nearly half a century ago, Justice Roberts cautioned: 'Respect for tribunals must fall when the bar and the public come to understand that nothing that has been said in prior adjudication has force in a current controversy.' [Citation]. . . . By announcing new rules prospectively or by applying them selectively, a court may dodge the *stare decisis* bullet by avoiding the disruption of settled expectations that otherwise prevents us from disturbing our settled precedents. Because it forces us to consider the disruption that our new decisional rules cause, retroactivity combines with *stare decisis* to prevent us from altering the law each time the opportunity presents itself." *Id.* at 548.

The non-publication rules allow appellate courts to dodge the *stare decisis* bullet. The scheme created by the rules permit courts to apply or refuse application of any law or rule without restraint.

B. The Non-Publication Rules Set Up a System of Unconstitutional "Selective Prospectivity" by Permitting Courts to Apply Rules of Law on an Arbitrary and *Ad hoc* Basis, Without any Check on Their Exercise of Power.

As set forth above, petitioner alleged that the lack of mandatory standards for publication allow the courts to apply new rules of law on an arbitrary and *ad hoc* basis, thus setting up an unconstitutional scheme of selective prospectivity. Petitioner specifically alleged that criminal defendants have been, and can be, deprived of the ability to cite cases which would otherwise be favorable or controlling. CT 6, 237-38. Because of Rule 977, petitioner was precluded from citing specific examples of this arbitrary exercise of judicial power. Indeed, the Court of Appeal even denied petitioner's request to cite such examples during oral argument.[3] The Court thereby protected itself

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[3] Petitioner's case was dismissed on demurrer, before he had the chance to conduct discovery. However, petitioner was prepared to cite cases in which courts set forth new rules of law, or construed statutes to relieve parties of civil or criminal liability, which by virtue of their unpublished status would not be applied in future cases. For example, in one case, the Fourth District construed a statute barring the infliction of unjustifiable mental suffering on a child to *not* apply to situations where parents leave "latch-key" children home alone. App. 22-34. "To so hold" the court noted, "would be to brand thousands of employed couples and single parents as common criminals. It *is* justifiable to leave these children alone on occasion because, as we shall explain, there is often no other way." App. 24. The Court noted that there was not a *single* California case on point. App. 24. Yet, this groundbreaking decision was marked "Not to be Published" thus precluding those "thousands" of parents from locating this authority to determine how to conform their

from having to hear about the harm it is causing. How can a citizen petition this branch of government for redress of grievance if it may choose not to hear of its misconduct?

In the Opinion below, the Court of Appeal recognized the perils of selective prospectivity. App. 1-14. However, in coming to the conclusion that the rules posed no such danger, the court simply ignored the fact that the nonpublication rules lack *any* mandatory standards for publication. Instead the court simply assumed, without reference to any supporting evidence, that courts are properly selecting cases for publication according to the criteria set forth in Rule 976(b). Without examining the nature and content of the 93% of cases which go unpublished, the Court of Appeal simply assumed that these opinions contributed nothing to the body of *stare decisis*. The court instead relied on the fact that it viewed *some* unknown percentage of cases as unworthy of precedential value, such as *Wende* opinions, appeals on undisputed points of law brought by nonlawyers in propia persona, and appeals simply urging the court to reweigh evidence. App. 1-14.

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behavior to the law or from citing this case to courts should they be prosecuted in the future. App. 22. Indeed, prosecuting authorities in California remain free to prosecute parents under this statute in the future for the *identical* conduct in which Ms. Kamiyama engaged, and no person may cite this case to relieve themselves from criminal liability. Thousands of parents remain under the cloud of criminal liability for conduct which one appellate court found could not be deemed criminal. By not publishing this groundbreaking case, which clearly met the standards for publication in Rule 976, the Court of Appeal made its ruling as to Ms. Kamiyama "selectively prospective" since no future litigant could take advantage of it.

The Court of Appeal failed to grapple with petitioner's allegations that in numerous *other* cases, the courts have refused to publish cases which do declare important and new rules of law, and have refused, or may refuse, to apply these new rules of law in future cases because of the provisions of Rule 977. The Court of Appeal further failed to correct this omission upon petitioner's request for rehearing. App. 14.

The danger posed by these rules is that they impose *no restrictions whatsoever* on the courts' discretion to make the rules of law set forth in those cases applicable to all. The ultimate decision whether to make law generally applicable lies in the complete and unfettered discretion of the Supreme Court to order publication or depublication of a particular case. Rule 976(c)(2). There are *no* restrictions whatsoever on this decision.

The very point of our constitutional system of checks and balances, and of the guarantees of equal protection and due process, is that no branch of government may be trusted to police itself. Because the nonpublication rules allow selective application of law to those similarly situated these rules cannot be allowed to stand. Moreover, because these rules allow the judiciary to make a specially chosen subset of its rules generally applicable to the public, and to remove others from general applicability, outside of the determination of a case or controversy, the judiciary has granted to itself an authority duplicative of that granted by the constitution to the legislature and thereby offend the very principles of separation of powers and the Rule of Law upon which our society is based.

II. THE NON-PUBLICATION RULES VIOLATE INDIVIDUALS' RIGHT TO FREEDOM OF SPEECH AND DENY LITIGANTS THEIR CONSTITUTIONAL RIGHT TO PETITION GOVERNMENT FOR THE REDRESS OF GRIEVANCES.

Rule 977 is the essential evil in the selective publication scheme. It is this rule which makes precedent "disappear." Without Rule 977, arguably the other rules simply implement the court's right to determine which cases are published in a book entitled the "Official Reports" pursuant to contract. Absent any restriction on the citation of *other* opinions as precedent, such rules might be constitutional. What offends the constitution is the mandate that cases which are not published in the "Official Reports" are to be treated as if they don't exist, and the command that parties and attorneys not bring the law of these cases to the attention of any court, on pain of contempt.

This rule impermissibly infringes on freedom of speech by creating an unconstitutional prior restraint. U.S. Const., 1st Amend. Any system of prior restraint bears "a heavy presumption against its constitutional validity." *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558 (1975). Here, Rule 977 is absolutely a prior restraint – it commands litigants and attorneys not to speak a word about any unpublished case, no matter how relevant that case may be to the matter at hand and no matter how necessary to the administration of even-handed justice. Indeed, any attorney who even *mentions* such unpublished authority risks being sanctioned by the California courts. *See Alicia T. v. Los Angeles*, 222 Cal. App. 3d 869, 884-86 (1990) (attorney sanctioned in part for

relying on depublished opinion in opening and reply briefs).

Despite the fact that petitioner raised the free speech argument in his briefing and in the trial courts (CT 5), the Court of Appeal offered no justification for this prior restraint either in its opinion on petitioner's request for rehearing. App. 1-14. Instead, the Court of Appeal sidestepped the issue, stating that ban on citation to unpublished opinions means "nothing more than that they cannot be cited as precedent by other litigants who are not parties thereto." App. 11-12.

What is this, if not a restriction on speech? The court's reasoning defeats all the elegant protections of the doctrine of *stare decisis*. A rule prohibiting any litigant from apprising a court when it is failing to follow its own precedent is antithetical to the rule of law. Such rules sacrifice our cherished constitutional freedoms for the convenience of attorneys and courts and cannot withstand constitutional muster.

Finally, petitioner has standing to challenge these rules. In coming to the conclusion that petitioner did not allege a real and concrete injury, the court ignored the facts alleged by petitioner, and did not correct this fact upon rehearing. App. 4-5, 14.

Petitioner alleged that he had standing to challenge the rules, in that he had suffered concrete and particularized harm as both a citizen and an attorney. CT 241-42. Petitioner alleged that as a citizen, he is entitled to know and apprise himself of the laws of this state. The non-publication rules allow the courts to make "secret law" which may imminently subject petitioner to criminal

or civil liability, and petitioner has no access to this secret law. CT 241. Moreover, Rule 977 concretely impacts petitioner's free speech rights, in that he cannot cite unpublished cases which would relieve him from civil or criminal liability, or otherwise support his contentions. CT 241. Because petitioner is a practicing attorney, this rule directly interferes in his ability to practice his profession, to determine what the law is and to accurately advise his clients. CT 242. Finally, Rule 977 deprives petitioner of any realistic method to invoke the Rule of Law to control the obstinate rule of men.

Petitioner's allegations show that he has a personal stake in this dispute, that the injury he has suffered as a result of these rules, both as a citizen and as an attorney, is both concrete and particularized, and that this injury is capable of resolution through the judicial process. *See Raines v. Byrd*, 521 U.S. 811, 818-19 (1997). Petitioner has standing to contest these rules on his behalf and on behalf of all persons similarly situated.

CONCLUSION

For the foregoing reasons, petitioner requests this Court grant the petition for a writ of certiorari.

DATED: August 22, 2000

Respectfully submitted,

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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

MICHAEL SCHMIER,	
Plaintiff and Appellant,	**A085177**
v.	**(San Francisco County Super. Ct. No. 995232)**
THE SUPREME COURT OF CALIFORNIA et al.,	
Defendants and Respondents.	

Michael Schmier (appellant) appeals the dismissal of his complaint for injunctive relief and writ of mandate after the demurrer of respondents, the Supreme Court of California, the Court of Appeal of California and the Judicial Council of California, was sustained without leave to amend. Appellant seeks to enjoin respondents from enforcing the rules governing publication of opinions (California Rules of Court,[1] rules 976-979), contending they are unconstitutional and conflict with statutory law.

BACKGROUND

Rule 976(b) provides that no opinion of the Court of Appeal may be published in the official reports unless it

[1] Unless otherwise indicated, all further rule references are to the California Rules of Court.

"(1) establishes a new rule of law, applies an existing rule to a set of facts significantly different from those stated in published opinions, or modifies, or criticizes with reasons given, an existing rule; [¶] (2) resolves or creates an apparent conflict in the law; [¶] (3) involves a legal issue of continuing public interest; or [¶] (4) makes a significant contribution to legal literature by reviewing either the development of a common law rule or the legislative or judicial history of a provision of a constitution, statute, or other written law." Rule 976(c) provides that a Court of Appeal opinion shall not be published unless a majority of the court rendering the opinion certifies that it meets one of the standards of rule 976(b). It further provides that a Court of Appeal "opinion certified for publication shall not be published, and an opinion not so certified shall be published, on an order of the Supreme Court to that effect."

An opinion that is not certified for publication cannot subsequently be cited as legal authority or precedent, except as relevant to the doctrines of law of the case, res judicata, or collateral estoppel, or as relevant to a criminal or disciplinary action because the opinion states reasons for a decision that affects the same defendant or respondent in another action. (Rule 977.)

Rule 978 sets forth the procedure for requesting publication of a Court of Appeal opinion not certified for publication by that court. If the Court of Appeal does not honor the request, rule 978 obligates the Supreme Court to then rule on the request. Rule 979 sets forth a similar scheme pertinent to depublication.

Appellant, individually and purportedly on behalf of all persons similarly situated, filed an action for injunctive relief and writ of mandate to compel respondents to publish all Court of Appeal opinions and to permanently enjoin them from enforcing the rules governing publication. He contends the rules violate the federal and state constitutional doctrine of separation of powers and the constitutional rights to petition the government for redress of grievances, freedom of speech, due process and equal protection. He further contends that the rules violate Civil Code section 22.2, which states that the common law of England is the rule of decision of all California state courts unless inconsistent with the federal constitution or the state constitution or statutes and the doctrine of stare decisis.

Respondents demurred primarily on the ground the trial court lacked subject matter jurisdiction because the Supreme Court alone is vested with the responsibility to regulate the publication of Court of Appeal opinions.

The trial court sustained the demurrer without leave to amend and ordered the case dismissed.

Discussion

In reviewing the sufficiency of a complaint against a general demurrer, we treat the demurrer as admitting all material facts properly pleaded. When a complaint has been sustained without leave to amend, we determine if there is a reasonable possibility the defect can be cured by amendment; if so, we reverse. The burden of proving such a reasonable possibility lies with the plaintiff. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

I

Preliminarily, we observe that the complaint lacks facts sufficient to establish the requisite element of appellant's standing to bring the action. A person who invokes the judicial process lacks standing if he, or those whom he properly represents, "does not have a real interest in the ultimate adjudication because [he] has neither suffered nor is about to suffer any injury of sufficient magnitude reasonably to assure that all of the relevant facts and issues will be adequately presented." (*California Water & Telephone Co. v. County of Los Angeles* (1967) 253 Cal.App.2d 16, 22-23, fn. omitted.) When a complaint fails to state a cause of action in favor of the plaintiff, a demurrer for failure to state a cause of action will be sustained. (*Parker v. Bowron* (1953) 40 Cal.2d 344, 351.)

Where the enforcement of a rule may cause irreparable injury, only *the injured party* may attack its constitutionality by an action to enjoin its enforcement. (*McKay Jewelers, Inc. v. Bowron* (1942) 19 Cal.2d 595, 599) A writ of mandate is granted " 'only where necessary to protect a substantial right and only when it is shown that some substantial damage will be *suffered by the petitioner* if said writ is denied.' [Citations.]" (*Parker v. Bowron, supra,* 40 Cal.2d at p. 351, italics added.) It will not lie where it is apparent the petitioner has " ' "no direct interest in the action sought to be coerced, and that no benefit can accrue to him from its performance." ' [Citation.]" (*Ibid.*)

Appellant's complaint alleges that "in numerous cases" the Supreme Court and Court of Appeal have refused the requests of unidentified litigants and others to publish a Court of Appeal decision, and contains the

vague allegation that the depublication rules deprive criminal defendants of "the right to cite a case otherwise favorable and controlling of [their] fate." However, the complaint does not identify any specific injury appellant or those he purports to represent have suffered or will suffer due to the nonpublication or depublication of an appellate opinion. Absent such an allegation, appellant lacks standing in this action. However, as discussed below, even were he able to allege a specific situation wherein nonpublication harmed or would harm him, he would be unable to state a viable cause of action.

II

The Judicial Council of California is constitutionally empowered to adopt rules for court administration, practice and procedure, providing they are not inconsistent with statute. (Cal. Const., art. VI, § 6.) The consistency of a rule is tested against the statutory scheme the rule was intended to implement. (See *People v. Hall* (1994) 8 Cal.4th 950, 959-960.)

California Constitution, article VI, section 14 requires the Legislature to provide for the prompt publication of such opinions of the Courts of Appeal "as the Supreme Court deems appropriate." Government Code section 68902 states: "Such opinions . . . of the courts of appeal . . . as the Supreme Court may deem expedient shall be published in the official reports [which] shall be published under the general supervision of the Supreme Court." The broad constitutional and legislative authority granting the Supreme Court selective publication discretion manifests a policy that California's highest court,

with its supervisory powers over lower courts, should oversee the orderly development of decisional law, giving due consideration to such factors as (a) "the expense, unfairness to many litigants, and chaos in precedent research," if all Court of Appeal opinions were published, and (b) whether unpublished opinions would have the same precedential value as published opinions. (*People v. Valenzuela* (1978) 86 Cal.App.3d 427, 441 (dis. opn. of Jefferson, J.) [addressing issue not addressed in maj. opn.].) By providing the mechanism for realizing this policy, the rules are consistent with the statutory scheme they were intended to implement.

Contrary to appellant's assertion, the rules do not conflict with Civil Code section 22.2, which provides that "[t]he common law of England, so far as it is not repugnant to or inconsistent with the Constitution of the United States, or the Constitution or laws of this State, is the rule of decision in all the courts of this State." As used in this statute, common law of England refers to "the whole body of that jurisprudence as it stood, influenced by statute, at the time when the code section was adopted." (*Martin v. Superior Court* (1917) 176 Cal. 289, 293.) Common law is now largely codified in California (see, e.g., Civ.Code, § 4, Code Civ. Proc., § 4, Pen.Code, § 4), and statutes are presumed to codify common law rules, absent clear language disclosing an intent to depart therefrom. (*Saala v. McFarland* (1965) 63 Cal.2d 124, 130; *People v. Zikorus* (1983) 150 Cal.App.3d 324, 330; see also Civ.Code, § 5.)

However, neither the Legislature nor the courts are precluded from modifying or departing from the common law, and frequently do. A well-known departure, for

example, is the community property system, whereby the Legislature incorporated Spanish law rather than the English common law rules pertinent to the marital estate. (*Roberts v. Wehmeyer* (1923) 191 Cal. 601, 611.) Similarly, the Legislature enacted a system of discovery in civil cases (Code Civ. Proc., § 2016 et seq.) by substantially adopting the federal rules of discovery (*Greyhound Corp. v. Superior Court* (1961) 56 Cal.2d 355, 375), which in turn established a pretrial fact-finding mechanism with a breadth not contemplated at common law (see *Hickman v. Taylor* (1947) 329 U.S. 495, 500-501, and fns. therein).

Appellant has not cited and we are unaware, of any common law rule governing the publication or citation of opinions. To the extent appellant suggests that the common law of England requires that all appellate decisions will be published and may be cited as authority, such a rule is inconsistent with the constitution and laws of this state, including the rules of court, which have the force of positive law. (*Villa v. Superior Court* (1981) 124 Cal.App.3d 1063, 1065.) "As a rule of conduct, [common law] may be changed at the will of the [L]egislature, unless prevented by constitutional limitations. The great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances. [Citation.]" (*People v. Hickman* (1928) 204 Cal. 470, 479) By specifically empowering the Supreme Court to determine which opinions of the Court of Appeal are appropriate for publication, the Legislature and the electorate have clearly disclosed an intent that the decisional law of this state does not require publication of every opinion of the intermediate appellate courts. Rather, the Supreme Court appropriately determines by

selective publication the evolution and scope of this state's decisional law.

Nor do the rules contravene the doctrine of stare decisis, which obligates inferior courts to follow the decisions of courts exercising superior jurisdiction. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Although the doctrine embodies an important social policy by representing an element of continuity in law and serving the psychological need to satisfy expectations, it is a principle of judicial policy, not a rule of constitutional or statutory dimension. (See *Helvering v. Hallock* (1940) 309 U.S. 106, 119.) Therefore, the Supreme Court – California's highest court – is the appropriate body to establish policy for determining those Court of Appeal opinions entitled to the precedential value of the stare decisis doctrine.

Relying principally on *James B. Beam Distilling Co. v. Georgia* (1991) 501 U.S. 529 (*Beam*), appellant claims the rules violate the constitutional guarantees of due process and equal protection (U.S. Const., 14th Amend.; Cal. Const., art I, § 7, subd. (a)) by creating a system of selective prospectivity that allows courts to create a new rule of law applicable to a single case. As articulated in Beam, selective prospectivity occurs when a court expressly overrules a decisional precedent, but applies the new rule only to the case in which the new rule is announced, returning to the old rule with respect to all other cases arising on facts predating the pronouncement of the new rule. (*Id.* at pp. 534-537) *Beam* held that in civil as well as criminal cases, when the court applies a new rule of law to litigants in one case, "it must do so with

respect to all others not barred by procedural requirements or res judicata." (*Id.* at pp. 538, 544.) As *Beam* also observed, opinions that overrule precedent are rare. "In the ordinary case, no question of retroactivity arises. Courts are as a general matter in the business of applying settled principles and precedents of law to the disputes that come to bar. [Citation.] Where those principles and precedents antedate the events on which the dispute turns, the court merely applies legal rules already decided, and the litigant has no basis on which to claim exemption from those rules." (*Id.* at p. 534.)

The rules protect against selective prospectivity by providing a uniform and reasonable procedure to assure that actual changes to existing precedential decisions are applicable to all litigants. They require that *all* opinions of the state's highest court be published. (Rule 976(a).) They establish comprehensive standards for determining publication of Court of Appeal cases, particularly specifying that an opinion announcing a new rule of law or modifying an existing rule be published. (Rule 976(b).) They permit any member of the public to request the Court of Appeal to publish an opinion and, if the request is denied, require the Supreme Court to rule thereon. (Rule 978.) In short, the rules assure that all citizens have access to legal precedent, while recognizing the litigation fact of life expressed in *Beam* that most opinions do not change the law. If appellant's view prevailed, the Supreme Court would be unable to decertify opinions for publication, which would seriously compromise its ability to control the direction of appellate precedent.

The validity of the publication rules finds support in the parallel rules of the federal court system. In the Court

of Appeals for the Ninth Circuit, for example, only opinions, not memoranda, are published. (See Fed. Rules of App. Proc. rules 36-1, 36-2 & 36-3, 28 U.S.C. (hereafter "circuit rules").) Circuit rule 36-3, like California Rules of Court, rule 977, provides that dispositions other than opinions and orders designated for publication are not precedent and may not be cited except as relevant to law of the case, res judicata or collateral estoppel.

Appellant either misunderstands or ignores the realities of the intermediate appellate process. If appellant's view prevailed, the Court of Appeal would be required to publish all *Wende*[2] opinions. As every criminal lawyer knows, a *Wende* case is one in which appellate counsel in a criminal appeal advises the court that no arguable appellate issues can be found, thereby invoking the obligation of the Court of Appeal to conduct an independent review of the record. A typical *Wende* opinion merely recites that the court's independent review has revealed no arguable issues. We have appeals from criminal defendants who enter into plea bargains in which they agree, for example, to accept the midterm as their sentence, and then appeal contending the court abused its discretion by sending them to prison. We also have appeals in criminal cases which challenge the constitutionality of the reasonable doubt instruction, in spite of the fact that every appellate court which has ruled thereon has found it to pass constitutional muster. (See, e.g., *People v. Hearon* (1999) 72 Cal.App.4th 1285, 1286-1287; *People v. Aguilar* (1997) 58 Cal.App.4th 1196, 1207-1209.) We have appeals in family law cases where the trial court has divided the

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2 *People v. Wende* (1979) 25 Cal.3d 436.

community assets equally, as it is required to do; but one of the parties nevertheless appeals for reasons having nothing to do with the law or the facts, conceding the equal division, but contending he or she failed to receive one of the assets that party wanted. We have appeals from parties seeking relief based on matters outside the appellate record, which we cannot review. We have appeals from nonlawyers appearing in propria persona, filing incomprehensible briefs with no understanding of the rules of appellate review, urging us to reweigh the evidence and reject, for example, the testimony of the six witnesses who said the traffic signal was red rather than green when appellant drove through it and struck the pedestrian in the crosswalk. Our typical opinions in such cases add nothing to the body of stare decisis, and if published would merely clutter overcrowded library shelves and databases with information utterly useless to anyone other than the actual litigants therein and complicate the search for meaningful precedent. Appellant fails to explain how or why such opinions contribute to the corpus juris.

Finally, in closing we address appellant's erroneous notion that nonpublication equates with secrecy. It hardly needs mentioning that opinions, rulings and orders of the Court of Appeal are public records, open to all. Indeed, the nonpublished opinions are not only available to the public, but frequently become the subject of media broadcasts and publications. One can now track the progress of cases in the First District through the internet, and the other appellate districts will soon be online as well. The fact that opinions are not published in the official reports means nothing more than that they cannot be cited as

precedent by other litigants who are not parties thereto. But they are certainly available to any interested party.

Conclusion

An injunction cannot be granted to prevent the exercise of a public office "in a lawful manner, by the person in possession." (Code Civ. Proc., § 526, subd. (b)(6).) The rules were established by persons in possession of a public office with authority to do so, and they comport with applicable statutory and constitutional requirements. Since an injunction will not lie to refrain respondents from implementing them, appellant has not stated and cannot state a claim entitling him to relief. (Code Civ. Proc., § 430.10, subd. (e).)

Disposition

The judgment of dismissal is affirmed.

HANING, J.

We concur.

JONES, P.J.

STEVENS, J.

Trial Judge
David A. Garcia, Judge

Trial Court
Superior Court of the City and County of San Francisco Case No. 995232

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DIVISION 5

MICHAEL SCHMIER,
Plaintiff and Appellant,
v.
SUPREME COURT OF CALIFORNIA, et al.,
Defendants and Respondents.

A085177
San Francisco County No. 995232

BY THE COURT:

The petition for rehearing is denied.

(Filed March 22, 2000)

Date: MAR 22 2000 JONES, P.J. P.J.

First Appellate District, Division Five, No. A085177
S087534

IN THE SUPREME COURT OF CALIFORNIA
EN BANC

(Filed May 24, 2000)

MICHAEL SCHMIER,
Appellant

v.

THE SUPREME COURT OF CALIFORNIA Et Al.,
Respondents

Petition for review DENIED.

Mosk
Acting Chief Justice

WEST'S ANNOTATED CALIFORNIA CODES
CALIFORNIA RULES OF COURT
TITLE THREE. MISCELLANEOUS RULES
DIVISION III. RULES FOR PUBLICATION OF APPELLATE OPINIONS

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Current with amendments received through December 1, 1999

Rule 976. Publication of appellate opinions

(a) [Supreme Court] All opinions of the Supreme Court shall be published in the Official Reports.

(b) [Standards for publication of opinions of other courts] No opinion of a Court of Appeal or an appellate department of the superior court may be published in the Official Reports unless the opinion:

(1) establishes a new rule of law, applies an existing rule to a set of facts significantly different from those stated in published opinions, or modifies, or criticizes with reasons given, an existing rule;

(2) resolves or creates an apparent conflict in the law;

(3) involves a legal issue of continuing public interest; or

(4) makes a significant contribution to legal literature by reviewing either the development of a common law rule or the legislative or judicial history of a provision of a constitution, statute, or other written law.

(c) [Publication procedure]

(1) [Courts of Appeal and appellate departments] An opinion of a Court of Appeal or an appellate department of the superior court shall be published if a majority of the court rendering the opinion certifies, prior to the decision's finality in that court, that it meets one or more of the standards of subdivision (b).

(2) [Supreme Court] An opinion certified for publication shall not be published, and an opinion not so certified shall be published, on an order of the Supreme Court to that effect.

(d) [Superseded opinions] Unless otherwise ordered by the Supreme Court, no opinion superseded by a grant of review, rehearing, or other action shall be published. After granting review, after decision, or after dismissal of review and remand as improvidently granted, the Supreme Court may order the opinion of the Court of Appeal published in whole or in part.

(e) [Editing] Written opinions of the Supreme Court, Courts of Appeal, and appellate departments of the superior courts shall be filed with the clerks of the respective courts. Two copies of each opinion of the Supreme Court and two copies of each opinion of a Court of Appeal or of an appellate department of a superior court which the court has certified as meeting the standard for publication specified in subdivision (b) shall be furnished by the clerk to the Reporter of Decisions. The Reporter of Decisions shall edit the opinions for publication as directed by the Supreme Court. Proof sheets of each opinion in the type to be used in printing the reports shall be submitted by the Reporter of Decisions to the court which prepared

the opinion for examination, correction and final approval.

Rule 976.1. Partial publication

(a) [Partial publication authorized] A majority of the court rendering an opinion may certify for publication any part of the opinion that meets the standard for publications specified under subdivision (b) of rule 976. The published part shall indicate that part of the opinion is unpublished. All material, factual and legal, that aids in the application or interpretation of the published part shall be in the published part.

(b) [Other rules applicable] For purposes of rules 976, 977, and 978, the published part of the opinion shall be treated as a published opinion, and the unpublished part as an unpublished opinion.

(c) [Copy to Reporter of Decisions] One extra copy of both the published and unpublished parts of the opinion shall be furnished by the clerk to the Reporter of Decisions.

Rule 977. Citation of opinions

(a) [Unpublished opinions] An opinion of a Court of Appeal or an appellate department of the superior court that is not certified for publication or ordered published shall not be cited or relied on by a court or a party in any other action or proceeding except as provided in subdivision (b).

(b) [Exceptions] Such an opinion may be cited or relied on:

(1) when the opinion is relevant under the doctrines of law of the case, res judicata, or collateral estoppel; or

(2) when the opinion is relevant to a criminal or disciplinary action or proceeding because it states reasons for a decision affecting the same defendant or respondent in another such action or proceeding.

(c) [Citation procedure] A copy of any opinion citable under subdivision (b) or of a cited opinion of any court that is available only in a computer-based source of decisional law shall be furnished to the court and all parties by attaching it to the document in which it is cited, or, if the citation is to be made orally, within a reasonable time in advance of citation.

(d) [Opinions ordered published by Supreme Court] An opinion of the Court of Appeal ordered published by the Supreme Court pursuant to rule 976 is citable.

Rule 978. Requesting publication of unpublished opinions

(a) [Request procedure; action by court rendering opinion] A request by any person for publication of an opinion not certified for publication may be made only to the court that rendered the opinion. The request shall be made promptly by a letter stating the nature of the person's interest and stating concisely why the opinion meets one or more of the publication standards. The request shall be accompanied by proof of its service on each party to the action or proceeding in the Court of

Appeal. If the court does not, or by reason of the decision's finality as to that court cannot, grant the request, the court shall transmit the request and a copy of the opinion to the Supreme Court with its recommendation for disposition and a brief statement of its reasons. The transmitting court shall also send a copy of its recommendation and reasons to each party and to any person who has requested publication.

(b) [Action by Supreme Court] When a request for publication is received by the Supreme Court pursuant to subdivision (a), the court shall either order the opinion published or deny the request. The court shall send notice of its action to the transmitting court, each party, and any person who has requested publication.

(c) [Effect of Supreme Court order for publication] An order of the Supreme Court directing publication of an opinion in the Official Reports shall not be deemed an expression of opinion of the Supreme Court of the correctness of the result reached by the decision or of any of the law set forth in the opinion.

Rule 979. Requesting depublication of published opinions

(a) [Request procedure] A request by any person for the depublication of an opinion certified for publication shall be made by letter to the Supreme Court within 30 days after the decision becomes final as to the Court of Appeal. Any request for depublication shall be accompanied by proof of mailing to the Court of Appeal and proof of service to each party to the action or proceeding. The request shall state the nature of the person's interest and

shall state concisely reasons why the opinion should not remain published. The request shall not exceed 10 pages.

(b) [Response] The Court of Appeal or any person may, within 10 days after receipt by the Supreme Court of a request for depublication, submit a response, either joining in the request or stating concisely reasons why the opinion should remain published. A response submitted by anyone other than the Court of Appeal shall state the nature of the person's interest. Any response shall not exceed 10 pages and shall be accompanied by proof of mailing to the Court of Appeal, and proof of service to each party to the action or proceeding, and person requesting depublication.

(c) [Action by Supreme Court] When a request for depublication is received by the Supreme Court pursuant to subdivision (a), the court shall either order the opinion depublished or deny the request. The court shall send notice of its action to the Court of Appeal, each party, and any person who has requested depublication.

(d) [Limitation] Nothing in this rule limits the court's power, on its own motion, to order an opinion depublished.

(e) [Effect of Supreme Court order for depublication] An order of the Supreme Court directing depublication of an opinion in the Official Reports shall not be deemed an expression of opinion of the Supreme Court of the correctness of the result reached by the decision or of any of the law set forth in the opinion.

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re MICHAIKO KAMIYAMA on Habeas Corpus	G022140 (Super. Ct. No. AP-10379) (Muni. Ct. No. 96WM03282) OPINION (Filed May 29, 1998)

Original proceedings; petition for a writ of habeas corpus to challenge an order of the Municipal Court of Orange County, Sarah H. Jones, Judge. Writ granted.

Carl C. Holmes, Public Defender, Ronald Y. Butler, Chief Deputy Public Defender, Denise M. Gragg and Dennis M. Nolan, Deputy Public Defenders, for Petitioner.

Michael R. Capizzi, District Attorney, Maurice Evans, Chief Assistant District Attorney, and Brian F. Fitzpatrick, Deputy District Attorney, for Respondent.

* * *

Petitioner Michiko Kamiyama was convicted by jury of misdemeanor child abuse per Penal Code section 273a because she inflicted "unjustifiable mental suffering" by leaving her eight-year-old daughter, Julie Ann, a well-behaved and above average student according to the

evidence, home alone one evening at a private residence in a gated community in Huntington Beach. We find that proof insufficient to support the conviction as a matter of law.

I

When she had to leave unexpectedly for work about 9 p.m. on January 12, 1996, to fill in as a singer in a band she hoped to work for, Kamiyama instructed her daughter not to answer the telephone or let anyone in, including someone who claimed to be the police. After several hours of trying, she had been unable to find a baby-sitter. Julie Ann was upset and crying and threw a tantrum, apparently before her mother left. The police were summoned by a neighbor who heard the child screaming. Julie Ann testified she stopped making noise and locked herself in her room when her mother departed. All was quiet when the police arrived.

Julie Ann did not answer the officer's knocks or the telephone. The officers heard nothing, but entered through a downstairs window. When they heard whimpering behind an upstairs locked door, they kicked it in.

The prosecution theory is grounded on Julie Ann's mental suffering at having been left home alone. The jury bought it, and the conviction was affirmed by the appellate department. We reject the notion that merely causing a normal eight-year-old child to feel alone and afraid, when left in the confines of her own home, is sufficient to support the drastic remedy of criminal prosecution, although a social services agency might appropriately

pursue a civil remedy in the juvenile court in such circumstances to provide *support and education* to a parent.

II

Latch-key children, often alone, lonely, and afraid, are an unfortunate reality of modern urban life. This mother's conduct simply did not inflict "*unjustificable* . . . mental suffering" on her daughter, as the statute requires. (Pen. Code § 273a, subd. (b), italics added.) To so hold would be to brand thousands of employed couples and single parents as common criminals. It *is* justificable to leave these children alone on occasion because, as we shall explain, there is often no other way.

People v. Rodriguez (1960) 186 Cal.App.2d 433 is illustrative, although we do not necessarily subscribe to its holding. There the defendant left four children, ages six and younger, home alone for many hours while she went to a bar. One of the children died in a fire, but the court found defendant was merely negligent and not culpable for the crime of manslaughter based on section 273a. (See *id.* at pp. 440-441.) Here it is doubtful that there was negligence and certainly an inadequate showing of unjustifiable mental suffering based on the extremely weak evidence of fear and loneliness set out in the settled statement. In other words, as the public defender argues, " 'it appears that the statute under which [petitioner] was convicted did not prohibit [her] conduct.' " (*In re Wallace* (1970) 3 Cal.3d 289, 293.)

We have not encountered a California case on point. But *People v. Seward* (1997) 173 Misc.2d 1020 [662 N.Y.S.2d 731] dealt with similar facts and a similar statute. There a

crying 6-year-old telephoned the police at about 2 a.m. complaining of being left alone. This was the holding: "The court agrees with the defendant's assertion that the facts alleged in the information do not support the crime of endangering the welfare of a child. One is guilty of the crime of endangering the welfare of a child when 'he knowingly acts in a manner likely to be injurious to the physical, mental or moral welfare of a child less than seventeen years old . . . ' (P.L. 260.10(1)). Leaving a child as young as 6 years of age at home alone, even for the roughly one-hour time period alleged in the information, does not evidence good parenting skills, and it is not a practice that this court agrees should be used with children of this age. However, the court nevertheless finds that the sole fact of leaving a 6-year-old child at home alone for one hour during the night does not rise to the level of criminal activity [as a matter of law]. . . . " (*Id.* at 1021 [662 N.Y.S.2d at 732].)

Surely there is an age below which children must be supervised at all times. But if nine is to be that age for a youngster of ordinary intelligence and maturity, the Legislature should so advise because a very large portion of the adult population is now subject to regular criminal prosecution on the theory employed by the district attorney in this case.

Most latch-key children are home alone afternoons and early evenings, but we view the nighttime aspect of this case as an essentially neutral fact because it may be reasoned that a child is safest and less likely to find mischief at bedtime. Nine o'clock was surely this child's bedtime, or close to.

The district attorney claims we cannot reach the sufficiency of the evidence issue because that would have been resolved in the direct appeal. Not so. When a penal statute is simply inapplicable to conduct not in material dispute, we may so conclude as a matter of law. (See *In re Zerbe* (1964) 60 Cal.2d 666, 668 ["a defendant is entitled to habeas corpus if there is no material dispute as to the facts relating to [her] conviction and if it appears that the statute under which [she] was convicted did not prohibit [her] conduct."].) The hurt feelings of a child, age eight and of normal intelligence, left home alone for a reasonable period of time simply do not "rise to the level of criminal activity on the part of the" parent. (*People v. Seward, supra,* at p. 1021 [662 N.Y.S.2d at p. 732].)

III

We now turn to the dissent's "appalling" analysis (see dissent, first line). First we are accused of reweighing the evidence. Hardly. We accept all the facts in the settled statement as true. But if the settled statement said the victim lived, yet the defendant was convicted of murder, we would reverse. Why? For the same reason we grant this writ: The facts taken in their best light for the prosecution simply do not support a conviction based on inflicting *unfustifiable* mental suffering: Mental suffering maybe, but not *unjustifiable* suffering.

Parents *must* inflict mental suffering on their children at times. It is part of parenting and part of growing up: "I know you are afraid, but this is the first day of kindergarten and you must attend." "No you may not have seconds on the ice cream because you did not finish your

asparagus." "You may not watch TV until your homework is completed." "You may not go out this weekend because you lied to me." "You may not have a new jacket like Sue's; we cannot afford a new jacket." "You are going to have this vaccination, and no amount of tantrums will change that." "Until your chores are completed, you may not go out to play." "You are going to church with the rest of us, and that is the end of it." "You will go with me to your grandmother's house, and you will smile all the while – assuming you know what's good for you." "If you do not take Spot for a walk first, you may not go to the movies." And so on, and so on. Any of this might provoke a tantrum from an otherwise well-adjusted and normal child, depending on a wide range of accompanying factors. Stripped of the irrelevancies the dissent relies upon, that is this case. Nothing prohibits us from vacating spurious verdicts that find no support in the record.

The dissent faults the mother for failing to tell the daughter where she was going and for instructing her not to answer the phone or let the police in. We think this was wrong, too. But there is a system in place to deal with inadequate parenting which, at most, this was. That is the juvenile court system. (See Welf. & Inst. Code, § 300 et seq.) There the mother could have been counseled or even directed to parenting classes. A social worker and a judge could have monitored her behavior with a view to maintaining the family intact and protecting the child, if anyone thought that was really necessary. It is difficult to imagine, given the horrendous cases we review from the juvenile dependency system that never result in criminal prosecution, how this one did. One might speculate that where police force their way into a private residence and

break down a bedroom door that a certain amount of systemic self-justification might be involved.

Our dissenting colleague actually suggests that this statute *should* be enforced against all the parents of latchkey children. Talk about the need for more jails. Women alone act as heads of households for a "growing proportion of poor families . . . many of them in or near poverty despite the fact that these women work." (Pitegoff, *Child Care Enterprise, Community Development & Work* (1993) 81 Georgetown L.J. 1897, 1921.) Almost one-half of all poor parents "have a changing work schedule that makes stable care difficult." (Comment, *Welfare Reform* (1997) 16 Yale L. & Policy Rev. 221, 263, fn. 195.) Given the lack of any comprehensive or affordable childcare system within the United States, especially during so-called "nonstandard" hours where care is "particularly low" (Huntington, *Welfare Reform & Child Care: A Proposal for State Legislation* (1966) Cornell J.L. & Public Policy 95, 100), it is not surprising "a number of young children are simply left to care for themselves or are cared for by an older child." (Pitegoff, *supra*, 81 Georgetown L.J. at p. 1904.) The notion of criminalizing working mothers should be anathema to anyone who is seriously concerned about the increasing feminization of poverty.[1]

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[1] Half of all female-headed households with children (and roughly 40 percent of divorced women with children) live in poverty, and two-thirds of all preschool age children have mothers who work. (See Williams, *Restructuring Work and Family Entitlements Around Family Values* (1996) 19 Harv. J. Law & Public Policy 753, 753, fn. 13; Pitegoff, *supra*, 81 Georgetown L.J. at pp. 1908-1909.)

Finally, we are somehow accused of living 150 years in the past when children were chattels of their parents. Nonsense. The dissent seems to assume the parents are the chattels of the children, though.

We recognize the reality of modern-day life where "[c]hild care options for the working poor are extremely limited. . . . " (Pitegoff, *supra*, 81 Georgetown L.J. at p. 1906.) By contrast, "[i]n the past, many affluent children were cared for primarily by wet nurses, nannies, or other domestic workers, and less affluent children often were sent out as servants or apprentices at an early age." (Williams, *supra*, 19 Har. J. Law & Public Policy at p. 753.) We do not desire to return to a society whose solution to the problem of poverty was the debtors' prison. But that is precisely where the dissent would send petitioner, a highly vulnerable working mother, for the "crime" of raising a child while attempting to earn money to provide for her.

This *is not* the best of all possible worlds. As far as we have come in the last 150 years, most of us still do not enjoy the assistance of a Mary Poppins. Nannies and boarding schools are not in the cards for any but the wealthy few. Single parents *have* to work. Welfare will not even be an option much longer; and both parents have to work in many, many families to make ends meet. After school and during vacation periods, the streets, beaches, homes, and malls are crowded with unattended children. Some of them are lonely; some get hurt or killed; and many are victimized or victimize others. This is all a shame, one of the great failings of our otherwise fabulously wealthy society; but it is not for the criminal justice system to select one single mother trying to raise a child

and make an honest living for prosecution simply because her child threw a tantrum.

Let a writ of habeas corpus issue vacating petitioner's conviction.

CROSBY, J.

I CONCUR:

SILLS, P. J.

SONENSHINE, J., Dissenting;

There are three reasons I find the majority's decision to overturn Michiko Kamiyama's jury conviction for misdemeanor child endangerment arrogant and appalling. First, the majority substitutes its judgment for that of the jury, violating perhaps the most fundamental principle of appellate review. Second, it erroneously concludes Kamiyama's conduct was not published as a matter of law. And lastly, my brethren write in the framework of the dark ages of American jurisprudence, when parents' rights over their children superseded their obligations to them.

Surprisingly, my colleagues have not certified this case for publication. Because the majority opinion departs so much from established precedent and involves an issue of great public interest, I would opt to publish. (See Cal. Rules of Court, rule 976.)

I

THE FACTS

Kamiyama's neighbor, Jacqueline Cohee, heard screaming and pounding noises coming from Kamiyama's townhouse. Cohee knew a small child resided there and had previously heard such sounds. She therefore called 911 when the ruckus continued unabated for half an hour.

It was about 9:30 p.m. when the police arrived. They found the townhouse quiet, but the lights on. Cohee said she believed someone was still inside, and an officer knocked on the door and telephoned the residence. When no one answered, the officer entered the home through a rear window. He found eight-year-old Julie Ann alone in an upper bedroom. The little girl was crying uncontrollably, yet held her hands over her mouth to muffle her sobbing.

Julie Ann explained Kamiyama left her about 9 p.m. The child begged her mom not to go, and the two argued over her departure. However, in the end, Kamiyama deserted Julie Ann without telling her where she was going or how she could be reached. Instead, Kamiyama told Julie Ann to stay in her room and not answer the door for the police or use the phone.

The officers took Julie Ann to Orangewood Children's Home and left a note for Kamiyama to contact them. Kamiyama finally returned near 2 a.m., explaining she got a last-minute singing gig and could not find a baby-sitter. She expressed surprise when told it was inappropriate to leave Julie Ann home alone. Indeed, she had

previously abandoned Julie Ann despite her protests, saying she experienced the very same treatment while growing up in Japan. Kamiyama felt Julie Ann was simply a spoiled and selfish child.

II

THE LAW

Kamiyama was charged with violating Penal Code section 273a, subdivision (b) for inflicting "unjustifiable [ ] mental suffering" on Julie Ann. The jury found this standard satisfied in light of the totality of the circumstances. (See generally *People v. Curtiss* (1931) 116 Cal.App.Supp. 771, 778-781.) On appeal, we review this finding remembering "[w]hether the pain and suffering inflicted was 'unjustifiable' [is] a question of fact under a standard of reasonableness." (*People v. Deskin* (1992) 10 Cal.App.4th 1397, 1402.) In short, this is a jury call.

Putting its own take on the facts, however, the majority finds Kamiyama's conduct should have resulted in Julie Ann suffering nothing more than hurt feelings. My brethren substitute their judgment for that of the jury. But we are not at liberty to reweigh the evidence "[e]ven if we might have made contrary factual findings or drawn different inferences[.]" (*People v. Perez* (1992) 2 Cal.4th 1117, 1126.)

Nor can I agree with the majority opinion that Kamiyama's conduct did not, as a matter of law, violate the statute. Kamiyama had left Julie Ann home alone on previous occasions. This time, the child was so distraught her screaming protests could be heard throughout the

neighborhood. Julie Ann had good reason to be scared. Her mother failed to tell her where she was going or how she could be reached. Kamiyama also neglected to tell Julie Ann whom to contact or what to do in case of an emergency. In fact, Kamiyama told her daughter *not* to answer the door for the police or to use the phone. Thus, the officers were forced to break into her house, causing Julie Ann even more anguish. By the time the officers found Julie Ann upstairs, she was nearly hysterical. Yet, the little girl was still trying to obey her mother by muffling her crying. This is not a close question. The jury was without a doubt correct in finding Julie Ann incurred unjustifiable mental suffering.

As if the above were not enough, the majority justifies its decision by asserting Kamiyama's conduct is so prevalent that upholding her conviction would subject "a very large portion of the adult population [ ] to regular criminal prosecution." (Maj. opn., *ante*, at p. 4.) In other words, my colleagues question whether Kamiyama's conduct is criminal because everyone is doing it. I seriously doubt most parents engage in this type of behavior, but if so then all the *more* reason to enforce the statute.[1]

III

THE CONSEQUENCES

Sadly, the majority takes us back 150 years to a time when children were considered mere chattels of their

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[1] The social studies included in the majority opinion prove a sad truth. However, they should be found in a statute's legislative history, not cited as judicial authority.

parents. Under this primitive philosophy, parental child-rearing decisions were inviolable so long as they did not result in disfigurement or permanent injury. (*People v. Curtiss, supra,* 116 Cal.App.Supp. at pp. 775-777, citing *State v. Pendergrass* (1837) 19 N.C. 365.) Under the more enlightened view, parents are not the sole arbiters in matters relating to the care and protection of their children. (*People v. Curtiss, supra,* 116 Cal.App.Supp. at pp. 777-778.) Instead, society proscribes and punishes parental infliction of unjustifiable mental suffering on their children. (*Ibid.*)

The majority's diatribe demonstrates unbridled hubris. Relying on their own beliefs, my colleagues flaunt their judicial robes, pronouncing what the law *should* be. But the legislature already delineated what the law *is*. The temptation to decide a case based on our own agendas or public opinion can be intoxicating. But we must remember we are judges, not some sort of super-legislators. With that in mind, I would deny the petition for a writ of habeas corpus.

SONENSHINE, J.